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January 10, 2005

By Hand Delivery

Federal Trade Commission
Office of the Secretary
Room H-159 (Annex K)
600 Pennsylvania Avenue, NW
Washington, DC 20580

Re: Prerecorded Message EBR Telemarketing, Project No. R411001

Ladies and Gentlemen:

This comment letter is submitted on behalf of Visa U.S.A. Inc. in response to the notice of proposed rulemaking ("Proposed Rulemaking") and request for public comment by the Federal Trade Commission ("FTC"), published in the Federal Register on November 17, 2004.¹ The FTC is seeking comment on a proposed amendment to the Telemarketing Sales Rule ("TSR")² to create an additional call abandonment safe harbor to allow telemarketing calls that deliver a prerecorded message to consumers with whom the seller has an established business relationship. The FTC also is seeking comment on a petition to amend the TSR's call abandonment safe harbor provision to change the time frame for measuring the call abandonment rate from "measured per day per calling campaign" to "measured over a 30-day period."

The Visa Payment System, of which Visa U.S.A.³ is a part, is the largest consumer payment system, and the leading consumer e-commerce payment system, in the world, with more volume than all other major payment cards combined. For the 12-month period ending September 30, 2004, Visa U.S.A. card purchases approached a trillion dollars, with a total of 443 million Visa cards in circulation. Visa plays a pivotal role in advancing new payment products and technologies, including technology initiatives for protecting personal information and preventing identity theft and other fraud, for the benefit of its member financial institutions and their hundreds of millions of cardholders.

¹ 69 Fed. Reg. 67,287 (Nov. 17, 2004).

² 16 C.F.R. pt. 310.

³ Visa U.S.A. is a membership organization comprised of U.S. financial institutions licensed to use the Visa service marks in connection with payment systems.

Safe Harbor Background

Section 310.4(b)(1)(iv) of the amended TSR prohibits telemarketers from abandoning calls, as defined by the TSR. A telephone call is considered “abandoned” if a person answers the call and the telemarketer does not connect the call to a sales representative within two seconds of the person answering the call.⁴ The TSR, however, contains a safe harbor which is available to a telemarketer or seller that: (1) abandons not more than three percent of all calls answered by a person; (2) allows the phone to ring for fifteen seconds or four rings; (3) whenever a sales representative is unavailable within two seconds of a person’s answering the call, plays a prerecorded message stating the name and telephone number of the seller on whose behalf the call was made; and (4) maintains records documenting compliance.⁵

Safe Harbor Amendment to Permit Prerecorded Message to Consumers with Whom the Seller has an Established Business Relationship

The FTC proposes to amend the TSR to provide an additional call abandonment safe harbor to permit telemarketing calls delivering a prerecorded message to consumers with whom the seller has an established business relationship.⁶ Visa strongly supports this additional safe harbor.

Visa believes that prerecorded message campaigns to consumers with whom an entity has an established business relationship do not result in the harms that the TSR was designed to address—“dead air calls,” in which the consumer waits during a prolonged silence, and “hang ups.” Telemarketing campaigns that deliver a prerecorded message avoid these harms. These calls deliver a prerecorded message rather than dead air or hang ups.

The FTC’s Proposed Rulemaking also addresses how consumers may assert a do not call request when receiving a pre-recorded message. Visa believes the approach to this issue adopted by the Federal Communications Commission (“FCC”) is appropriate. Under the FCC’s approach, the telemarketer must provide a toll-free number during the call that consumers may call to request placement on the entity’s do not call list. Other proposed alternatives that would allow the consumer to register for the entity’s do not call list during the telemarketing call, either through transfer to a live representative by pressing a button or making an automated selection, are not viable because the technology to permit registration during the telemarketing call presently is not widely implemented and this technology would be costly and complicated to implement throughout the telemarketing industry. Visa believes the better approach would be to provide telemarketers with a choice of means of providing consumers with the ability to opt out, including, but not limited to, providing a toll-free number or the ability to transfer to a live operator by pushing a button.

⁴ 16 C.F.R. § 310.4(b)(1)(iv).

⁵ 16 C.F.R. § 310.4(b)(4).

⁶ 69 Fed. Reg. 67,287, 67,294 (Nov. 17, 2004).

Call Abandonment Calculation for the Safe Harbor

The FTC also is seeking comment on a petition to revise the methodology for calculating the call abandonment rate for the safe harbor. The petition requests that the TSR be amended to measure the safe harbor call abandonment rate over a 30-day period rather than on a daily basis. The 30-day standard would harmonize the TSR with the FCC's rules, creating uniformity for compliance purposes. Visa strongly urges the FTC and the FCC to harmonize their telemarketing requirements. Federal regulatory agencies should work to harmonize their rules when those rules address the same activity of the same entities. While our federal system provides for the possibility of differing state requirements, the federal government simply must speak with one voice. Conflicting policies in the executive branch of the federal government must be resolved by the executive branch itself, even when those policies are articulated by independent agencies within the executive branch. The private sector cannot be required to choose between conflicting statements of federal requirements. Even where it is possible to comply with competing federal requirements, doing so likely will lead to waste and results that were not intended by either agency.

The conflicting approaches to telemarketing calls to cell phones taken by the FTC and the FCC illustrate the whimsical results of the competing telemarketing rules. The FCC's telephone solicitation rule prohibits the use of autodialers to make calls to cellular telephones,⁷ effectively prohibiting telemarketing calls to cellular telephones. Despite this prohibition, in a press release dated December 10, 2004, the FTC indicated that the national do not call registry accepts both home phone numbers and cell phone numbers, prompting many individuals to register their cell phones even though, from a practical standpoint, telemarketing companies are prohibited from placing telemarketing calls to cell phones under the FCC rule. The uploading of these additional cell phone numbers to telemarketers' databases takes significant resources and is unnecessary because telemarketers already scrub their telephone lists for cell phone numbers in order to comply with the FCC's regulations. In practice, the FTC is requiring telemarketers to scrub their call lists against those numbers twice, once as part of the do not call lists and again when their lists are scrubbed for cell phone numbers under the FCC rule. This process increases compliance costs with no practical benefit. This duplicative process is not in the best interests of consumers, who ultimately bear unnecessary increases in marketing costs.

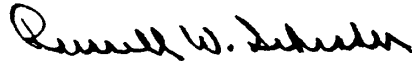
Of the two approaches, Visa believes the 30-day standard is preferable and would provide sellers with the flexibility necessary to recognize more fully the reduced costs offered by predictive dialers, particularly when campaigns are conducted by small businesses or from segmented lists.

⁷ 47 C.F.R. § 64.1200(a)(1)(iii).

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Visa appreciates the opportunity to comment on this important matter. If you have any questions concerning these comments, or if we may otherwise be of assistance in connection with this matter, please do not hesitate to contact me, at (415) 932-2178.

Sincerely,

A handwritten signature in black ink, appearing to read "Russell W. Schrader".

Russell W. Schrader
Senior Vice President and
Assistant General Counsel